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January 30, 2017  
11478-130

**BY E-MAIL & U.S. FIRST CLASS MAIL**

Cynthia E. Catri, Esq.  
U.S. Environmental Protection Agency  
Region 1  
5 Post Office Square  
Suite 100 (OES04-2)  
Boston, Massachusetts 02109-3912

**Re: Aerovox Facility – TSCA Determination**

Dear Ms. Catri:

I write again on behalf of our client AVX Corporation ("AVX") with respect to the applicability of the TSCA Determination to AVX's activities under the Administrative Consent Order and Notice of Responsibility with the Massachusetts Department of Environmental Protection and Office of the Attorney General ("ACO") and in accordance with M.G.L. c. 21E ("21E") and the Massachusetts Contingency Plan ("MCP"). AVX has asked that I respond to your letter of October 25, 2016.

AVX appreciates that EPA's intention is not to slow the progress of the 21E cleanup, which to date has proceeded expeditiously. Demolition of the Aerovox facility was completed ahead of schedule; the 21E/MCP work has met all deadlines, and continues to move forward apace. In a few short years, AVX's remedial accomplishments have already achieved significant improvements over previous conditions. The NTCRA work remains protective and fully compliant with TSCA while the 21E/MCP work proceeds.

AVX also appreciates EPA's acknowledgements that it does not have a direct oversight role in the 21E cleanup, and that its Superfund program's primary means of engagement with respect to the 21E cleanup is not through direct communication with AVX, but through communications with MassDEP, and meetings with MassDEP and AVX. Such statements, are helpful responses to AVX's earlier assertions regarding the agency's role at the site. Taken together, such statements encourage further communications to clarify each party's role at the site. To that end, in the balance of this letter, and with the hope for improved understanding, AVX addresses three aspects of EPA's letter of October 25.

### **No Newly-Discovered Conditions**

EPA admits that the TSCA Determination was intended to provide assurances to AVX that if AVX performed the 21E/MCP work in accordance with the terms of the TSCA Determination, then the work would satisfy TSCA requirements.<sup>1</sup> This confirms AVX's position in our September 2, 2016 letter acknowledging that TSCA compliance was required during 21E activities, but through AVX's adherence to the terms memorialized in the TSCA Determination rather than through EPA's day-to-day invocation of TSCA's authority and the agency's continuing engagement in the activities implemented under 21E.

In spite of this, EPA claims that its agreement to have the TSCA Determination deliver the necessary direction regarding TSCA compliance to AVX's conduct of 21E activities is only as good as EPA's understanding of site conditions at the time and goes so far as to say there are grounds for invoking the AOC reopener, though EPA declines to do so, apparently as a matter of discretion. EPA now claims that "[t]hrough the 21E investigations undertaken by AVX, and sediment sampling conducted in 2012 and 2015 by EPA in the Acushnet River along the Aerovox Site shoreline, information about the presence of DNAPL and off-site migration of PCB contamination has been discovered that now requires the TSCA program to re-evaluate the TSCA Determination."

AVX firmly and unequivocally rejects any suggestion that there are grounds to invoke the AOC reopener, an extreme step from any viewpoint. Unfortunately, EPA failed to review the record which amply demonstrates and undeniably establishes that the very facts that EPA claims to have learned after 2010 were explicitly called out by the record and informed or should have informed EPA's thought processes at the time the TSCA Determination was negotiated and finalized.

To begin with, DNAPL at the facility was observed from the outset. The presence of product at the site is noted in one of the earliest technical documents in the administrative record for the site, i.e., GHR's August 22, 1983 *Technical Specifications and Plans for Remedial Measures, Aerovox Property, New Bedford, MA* (SDMS DocID 56631). DL Maher boring logs for TB-22, TB-22A, TB-24 and TB-26 note "product" from 1-8.5 feet below ground surface ("bgs"), 0-7 feet bgs, 4-7 feet bgs, and 4-6 feet bgs, respectively. GHR boring logs for TB-4 and TB-7 note "oily sand" and "black oily clay" respectively. This data is summarized and presented in a figure attached to a February 15, 2007 email from David Dickerson (SDMS DocID 460575).

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<sup>1</sup> In effect, EPA has dropped its assertion in Kim Tisa's August 29, 2016 email that the TSCA Determination does not apply to the 21E/MCP work.



But more significantly, the Conceptual Site Model developed for EPA explicitly discusses the certain presence of DNAPL at the site. ENSR's March 2006 *Conceptual Site Model*, § 6.0 Potential for PCB Migration as DNAPL states in relevant part:

As PCBs were used at the Aerovox site in the liquid (oil) state, contamination beneath portions of the site likely includes residual pockets or pooled areas of PCB oil. Because the density of the PCB oil is greater than that of water, it is termed dense non-aqueous phase liquid (DNAPL). Given that PCBs have not been in use at the Aerovox site for nearly 30 years, PCBs that exist as DNAPL beneath the site are expected to be in a stable configuration, providing a source of contamination to infiltrating precipitation (if located above the water table) or to passing groundwater (if located below the water table), but not moving as a separate phase liquid. Future demolition activities at the site that include significant vibration or excavation, with potential exposure to increased infiltration, could mobilize PCBs that currently exist as DNAPL pooled beneath the slab of the building. However, any further migration of DNAPL [sic] is expected to be limited in extent given the length of time since PCBs were actively used at the site.

Given the site history and soil and groundwater concentrations, PCBs also likely exist in DNAPL form beneath the capped area between the building and the harbor, potentially residing above the low permeability peat layer. As the sheet-pile wall isolating this area from the harbor deteriorates over time, holes or gaps in the wall could allow for direct discharge of PCB oil into the harbor.

The presence of DNAPL in the subsurface was explicitly called out by AVX in the legal and technical comments on the SEE/CA it submitted to EPA on August 15, 2006. Under the major heading "SEE/CA Does Not Comply with the NCP," and the sub-heading "Recommended alternative does not contribute to efficient performance of any long-term remedial action," AVX cited another selection from the *Conceptual Site Model* that indicated the probability of DNAPL being present in the subsurface:

The historical release of separate phase PCB oil within the building and the surrounding area likely resulted in residual contamination of the soils beneath the site (pockets of oil filling in portions of the interstitial pore space between soil grains) as well as the potential for pools of oil residing above zones of lower permeability material. As the density of the PCB mixtures used at the site was greater than that of water (PCBs are classified as a dense non-aqueous phase liquid or DNAPL), PCB oils that historically drained through the soil could have continued a downward migration below the water table, potentially pooling above



bedrock or the zone of low permeability peat identified beneath the site (confining layer in Figure 1-4) and moving laterally along the rock or peat layer.<sup>2</sup>

The “sediment sampling conducted in 2012 and 2015 by EPA in the Acushnet River” should not be considered a changed condition or newly discovered. EPA’s stated objective for both the 2012 and 2015 sampling efforts was to support remedial planning efforts and fill spatial data gaps. The sampling in 2012 and 2015 confirmed depth and lateral extent of contaminants that EPA already knew existed in the sediment and subtidal area immediately offshore from the Aerovox site. Sampling prior to the original Records of Decision (“ROD”) for OU-1 and OU-2 showed levels of PCB impacts in sediments adjacent to Aerovox in the thousands to tens of thousands of mg/kg. For example, sample location S-1761 was located off shore in the same general area as the 2012 and 2015 effort, just north of the north discharge trough, and contained 100,000 mg/kg of PCBs; similarly, a sample collected at the mouth of the north discharge trough (S-1733a) had 45,000 mg/kg of PCBs (SDMS DocIDs 65327 and 65317). Multiple partial dredging rounds have been undertaken since that time, including the near shore partial dredging rounds in 2006 and 2008 which revealed “very high levels of PCBs and VOCs, particularly trichloroethene (TCE).” Jacobs/ACOE, *Final Technical Memorandum, Summary of Findings, New Bedford Harbor Superfund Site, 2012 Near-Shore Boring Program Adjacent to the Former Aerovox Property*, April 2013. Levels of PCBs and TCE encountered historically offshore from pre-ROD to post 2008 dredging were indicative of DNAPL conditions.

With respect to the off-site migration of PCB contamination, to the extent it is a reference to the PCBs in soil on the Titleist property, AVX refers EPA to the data from as early as 2000-01 indicating reportable concentrations of PCBs on Titleist’s property that EPA recently forwarded to Angela Gallagher at MassDEP and Marilyn Wade at Brown and Caldwell.<sup>3</sup>

In conclusion, there are no newly-discovered site conditions. The nature and magnitude of contaminants in the Acushnet River, the levels indicative of DNAPL and the off-site migration of PCBs have been known to EPA for as long as it has been studying the harbor and are by no means newly-discovered conditions. EPA’s litany of “new” facts ends in the statement that “the Aerovox Site is the primary source of contamination to the New Bedford Harbor Site.” Far from new information, it is hard to imagine a single statement that has been repeated more often since December 1983 when the United States first sued AVX. The record betrays EPA’s failed effort to fix upon an excuse to re-evaluate its risk-based determination under TSCA and to improperly threaten to re-open under CERCLA, to which AVX takes strong exception.

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<sup>2</sup> Page 1-2 of the *Conceptual Site Model*, cited in Gary L. Gill-Austern August 15, 2006 letter to David J. Dickerson regarding “April 2006 Supplemental Engineering Evaluation and Cost Analysis, Former Aerovox Facility, New Bedford, Massachusetts” at 26.

<sup>3</sup> Email from Elaine Stanley to Angela Gallagher and Marilyn Wade, December 5, 2016 (2:02 PM) on the subject “EPA Soil/Sediment Data on the Acushnet Company Property at 700 Belleville Avenue.”



### **The AOC Tightly Constrains EPA's Role During the 21E/MCP Work**

EPA claims that it continues to have a role at the site both during and after the 21E cleanup through the *Administrative Settlement Agreement and Order on Consent* between AVX and EPA ("AOC"). Such role, it states, has two aspects: to ensure the NTCRA work remains protective and compliant with the TSCA Determination; and to ensure its understanding of the 21E cleanup as it informs EPA's actions in planning and implementing the New Bedford Harbor Superfund Site cleanup. Regardless of the degree of interest, depth of concern or sense of obligation EPA may have as to both aspects, all understandable and appropriate, the AOC is completely silent on the second aspect. As to the first aspect, the AOC envisions a tightly-constrained and largely passive role limited to EPA being assured, as called for by the TSCA Determination, that the existing cap/containment barrier components remain intact during the 21E/MCP work.

As stated in our September 2, 2016 letter, since receipt of the Notice of Completion of Work under the AOC in May, 2013, AVX and its representatives have endeavored to maintain open lines of communication with EPA. As enumerated there, AVX and its representatives have met numerous times with EPA, provided independent written notice to EPA with each MCP eDEP submittal, welcomed EPA on site to observe field activities, coordinated such field observations to accommodate EPA schedules, and completed the annual cap inspections and repairs with EPA's participation. None of this however should be interpreted as more than professional courtesy.<sup>4</sup> Repeating the earlier letter's concluding comment in this regard, AVX has at all times sought to work cooperatively to inform and engage EPA, but without compromising the control of the site provided MassDEP and the LSP under 21E and the MCP.

EPA believes that AVX's commitment in Paragraph 67 of the AOC to implement post-removal site controls consistent with the TSCA Determination, particularly as such commitment is memorialized in the reporting obligations in the Maintenance and Monitoring Plan ("MM Plan"), highlights EPA's continuing role as a regulatory agency at the site. Such role, however, is significantly checked and limited by the particulars. The MM Plan does state that AVX will undertake certain activities during the 21E/MCP work necessary to ensure compliance with TSCA. Yet, at the same time, the MM Plan nowhere affords any role to EPA in the process. The MM Plan does not call for EPA representatives to attend any inspection or participate in any activities. Further, with respect to the monitoring and maintenance activities conducted during the 21E cleanup, AVX does not prepare a separate report to send to EPA. Rather, the steps taken

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<sup>4</sup> EPA's October 25, 2016 letter appears to make much of the events that have transpired since EPA provided the Notice of Completion of Work in May 2013 as if they demonstrate AVX's agreement that EPA's post-NTCRA active involvement is sanctioned by the AOC. Had AVX known that EPA would use its cooperative efforts against it, AVX might have paused before taking on such voluntary activities.



are reported to MassDEP as part of the immediately subsequent regular 21E/MCP submittal, with a copy provided to EPA.

The opening section of EPA's October 25, 2016 letter, entitled "Background," contextualizes the Action Memorandum (to which the TSCA Determination is an attachment) as the outgrowth of the 1998 Engineering Evaluation/Cost Analysis and the 2006 Supplemental Engineering Evaluation/Cost Analysis ("SEE/CA"). The letter gives the impression that the Action Memorandum and the TSCA Determination were prepared in advance of the active negotiations between the parties that commenced in February 2008. AVX notes, however, that the two documents were in fact the very last to be finalized, towards the very end of the parties' discussions.<sup>5</sup> In other words, the TSCA Determination was a product of the negotiations rather than an earlier-created document reflecting what EPA might argue is its norm with respect to TSCA and its jurisdictional reach.

There is, however, another Aerovox-related TSCA Determination that reflects such mindset, and provides a stark comparison. The 2006 SEE/CA included as Attachment 3 a proposed TSCA Determination that, like the TSCA Determination appended to the Action Memorandum, envisioned that the site would transfer to the 21E program upon completion of the demolition. In this instance, however, the 2006 TSCA Determination states that the "final closure plan shall be implemented in accordance with chapter 21E and the federal TSCA program" (emphasis added). Had the parties included a statement such as this in the now effective TSCA Determination, EPA might be able to argue it has a continuing role. The parties did not, and there is no basis for EPA to advance such argument.

#### **TSCA and the TSCA Determination**

The third and final topic to be addressed is the breadth of the TSCA Determination's reach. After further review of the TSCA Determination and the record of the 2008-10 negotiations, it is clear that the TSCA Determination applies not only to the Aerovox property but also to "any additional area capped pursuant to the Massachusetts 21E program."<sup>6</sup> Effectively, this precludes EPA from asserting any TSCA jurisdiction independent of the TSCA Determination with respect to the Aerovox and Precix properties, all of which are or will be capped and will fully comply with the TSCA Determination. It does not appear, however, that AVX can argue that the TSCA Determination governs activities on the Titleist property, solely because the property owner has recently indicated that it does not want an asphalt cap installed and is not willing to implement institutional controls, both conditions required by the TSCA

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<sup>5</sup> Negotiations were substantially concluded when the TSCA Determination was signed on December 24, 2009, and the Action Memorandum on January 27, 2010. AVX signed the AOC shortly thereafter, on March 16, 2010. The AOC's effective date is June 3, 2010.

<sup>6</sup> TSCA Determination, ¶ 6.

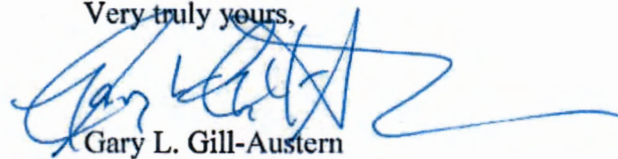
Cynthia E. Catri, Esq.  
U.S. Environmental Protection Agency  
January 30, 2017  
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Determination. Therefore, EPA may legitimately call for independent review, comment and approval of the remedial activities being conducted by AVX on the Titleist property.

In closing, please be advised some of the issues raised in the TSCA program's letter of November 1, 2016 have been addressed in a November 17, 2016 telephone conversation between Marilyn Wade, AVX's LSP, and Kim Tisa, EPA's PCB Coordinator, other matters were discussed at the December 8, 2016 meeting at MassDEP, and the remaining issues will be addressed in the forthcoming revised Phase III.

Please do not hesitate to call if you have any questions or wish to discuss anything raised by the above.

Very truly yours,



Gary L. Gill-Austern

cc (by email):

Ginny Lombardo, EPA  
Elaine Stanley, EPA  
Kimberly Tisa, EPA  
Gerard Martin, MassDEP  
Angela Gallagher, MassDEP  
Michele S.W. Paul, City  
Marilyn Wade, PE, LSP  
Evan Slavitt, Esq.  
Mary K. Ryan, Esq.





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December 12, 2016  
11478-130

**BY E-MAIL & U.S. FIRST CLASS MAIL**

Gerard Martin  
MassDEP Bureau of Waste Site Cleanup  
20 Riverside Drive  
Lakeville, Massachusetts 02347

**Re: Aerovox Facility – Dispute Resolution**

Dear Mr. Martin:

Our client, AVX Corporation ("AVX"), has not yet received MassDEP's decision letter concerning the Phase III Remedial Action Plan ("Phase III") it submitted on August 22, 2016. The Phase III was discussed at length during a meeting at MassDEP's Southeast Regional Office on Thursday, December 8, 2016. The agenda for the meeting, which AVX received on Wednesday, December 7, 2016, included explicit references to MassDEP's decisions concerning the remedial alternatives that the Phase III proposed for each of the operable units at the Aerovox Facility disposal site.

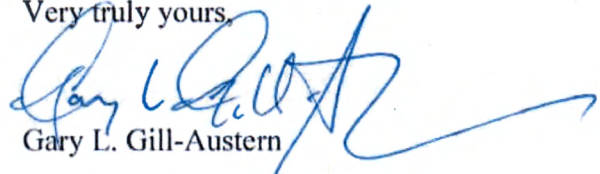
Paragraph 22 of the Administrative Consent Order and Notice of Responsibility ("ACO") provides the procedures governing dispute resolution. Subparagraph 22(a) provides that AVX may invoke dispute resolution to challenge a decision by MassDEP under Paragraph 14 of the ACO "within five (5) days after obtaining knowledge of [ ] a dispute." While recognizing that there were discussions at and after the meeting that may impact MassDEP's approach, as will be reflected in the forthcoming decision letter, AVX is compelled to send this letter out of an abundance of caution that AVX could be deemed to have knowledge of MassDEP's decisions by virtue of its receipt of the meeting agenda. Thus, to preserve its rights pending further developments, this letter serves as AVX's written notice of a dispute concerning MassDEP's denial of the selected remedial alternative for operable unit 3B (permeable reactive barrier). AVX also must reserve its rights to invoke dispute resolution with respect to other decisions of MassDEP that, as fleshed out in MassDEP's forthcoming decision letter, prove to be similarly problematic.



Gerard Martin  
MassDEP Bureau of Waste Site Cleanup  
December 12, 2016  
Page 2

Please do not hesitate to call if you have any questions or wish to discuss anything raised by the above.

Very truly yours,



Gary L. Gill-Austern

cc (*by email*):

Millie Garcia-Serrano, MassDEP  
Angela Gallagher, MassDEP  
Dawn Stolfi-Stalenhoef, Esq., MassDEP  
Marilyn Wade, PE, LSP  
Evan Slavitt, Esq.  
John Waites  
Mary K. Ryan, Esq.

3466562.1

## Lederer, Dave

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**From:** Lederer, Dave  
**Sent:** Monday, October 24, 2016 11:10 AM  
**To:** Barczynski, Hoshiaiah  
**Subject:** FW: EPA Draft Letter to AVX on Aerovox TSCA Determination  
**Attachments:** Draft Final Response to AVX letter re TSCA Determination 10 18 2016.docx

**From:** Lombardo, Ginny  
**Sent:** Tuesday, October 18, 2016 1:05 PM  
**To:** Gallagher, Angela (DEP) <Angela.Gallagher@MAssMail.State.MA.US>; Martin, Gerard (DEP) <Gerard.Martin@MassMail.State.MA.US>; Stolfi Stalenhoef, Dawn (DEP) <Dawn.Stolfi.Stalenhoef@MassMail.State.MA.US>  
**Cc:** Catri, Cindy <Catri.Cynthia@epa.gov>; Stanley, Elaine <stanley.elainet@epa.gov>; Lederer, Dave <Lederer.Dave@epa.gov>; Tisa, Kimberly <Tisa.Kimberly@epa.gov>; Cianciarulo, Robert <Cianciarulo.Bob@epa.gov>  
**Subject:** EPA Draft Letter to AVX on Aerovox TSCA Determination

Angela-

I just left you a voice mail to give you a heads up on this. Please give me a call if you want to discuss. As you are aware, on August 29, 2016, Kim Tisa, EPA's TSCA Coordinator, emailed AVX's LSP indicating that the TSCA Determination issued at the time of the NTCRA does not cover work conducted under the 21E cleanup program. On September 2, 2016, AVX issued a response to EPA on this issue disagreeing with that position. MassDEP was cc'd on the email and the AVX letter. Attached is EPA's draft response to AVX's September 2, 2016 letter.

As I noted in my voice mail, we are looking to issue this letter by next Tuesday October 25, 2016. Please contact me before then if you have any questions or concerns. Also, if you feel this matter warrants discussion at the senior manager level prior to EPA's issuance of this letter, please let me know. Bob Cianciarulo and I and/or Bryan Olson can contact Gerard and/or Millie to discuss, if needed.

Thank you.

Ginny Lombardo, Chief  
Remediation & Restoration II Branch  
U.S. EPA Region 1 – New England  
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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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**DRAFT – DO NOT RELEASE**

**By Electronic Mail: [GGill-Austern@nutter.com](mailto:GGill-Austern@nutter.com)**  
**and First Class-Mail**

**Date**

Gary L. Gill-Austern  
Nutter McClennen & Fish LLP  
155 Seaport Boulevard  
Boston, MA 02210

RE: Aerovox TSCA Determination for the Non-Time Critical Removal Action

Dear Mr. Gill-Austern:

Thank you for your thoughtful letter dated September 2, 2016, in which you set out your position on the applicability of the Vacant Aerovox Plant Non-Time Critical Removal Action Final TSCA 40 C.F.R. § 761.61(c) Determination, dated December 24, 2009, (“the TSCA Determination”) to AVX’s current 21E cleanup at the Aerovox Site. As you know, the TSCA Determination was Appendix C to EPA’s Action Memorandum for the Aerovox Non-Time Critical Removal Action (“NTCRA”), and the Action Memorandum, along with its Appendices, was also attached to the Administrative Settlement Agreement and Order on Consent for Non-Time Critical Removal Action between EPA and AVX, which became effective on June 3, 2010 (“AOC”).

We have seriously considered all of the points raised in your letter, and taken a number of steps to ensure our understanding is complete about this important matter, including reviewing the TSCA Determination, the Action Memo and the AOC, and consulting with Region 1’s TSCA program. Below is our explanation of why we continue to maintain that AVX, in order to be compliant with TSCA regulations during the 21E cleanup, should contact EPA’s TSCA representative, Kim Tisa, to make arrangement for review and approval by EPA’s TSCA program of the appropriate 21E submissions.

*Background*

Subsequent to investigations and studies documented in an August 1998 Engineering Evaluation/Cost Analysis (“EE/CA”) and an April 2006 Supplemental Engineering

Evaluation/Cost Analysis ("SEE/CA"), EPA issued an Action Memorandum for a Non-Time Critical Removal Action in 2010 ("the Action Memo") for the Aerovox Site. In general, the Action Memo called for demolition of onsite buildings, capping of the Site, and post-removal site controls including land and groundwater use restrictions and long-term maintenance and monitoring activities. The Action Memo also included a risk-based TSCA Determination issued under § 761.61(c) of TSCA. Concurrent with its preparation of the Action Memo, EPA issued a notice and demand letter to AVX for response costs at the Aerovox Site. As a result, AVX entered into settlement negotiations with EPA to undertake a portion of the work called for in the Action Memo. Because further cleanup would be needed to address Site contamination once the NTCRA work was completed, AVX also began settlement negotiations with the Commonwealth of Massachusetts to address the Site under the Massachusetts 21E program and with the City of New Bedford, owner of the Aerovox Site, for among other things, financial arrangements for some of the long-term care of the Site remediation. These negotiations resulted in three separate settlement agreements between AVX and EPA, AVX and the State, and AVX and the City of New Bedford.

Subsequently, AVX performed its portion of the NTCRA work, and EPA issued a Notice of Completion of the Work in May, 2013. Soon after, AVX began the 21E cleanup of the Site. While EPA does not have a direct oversight role in the 21E cleanup, we (along with our contractors) have participated in meetings, conference calls and site visits with AVX, MassDEP, the City of New Bedford and their contractors both because of EPA's continuing involvement at the Site discussed below and because of the shared interest of all parties in cooperating and coordinating with each other given the significant risk of impacts the Aerovox Site may have on EPA's cleanup of the New Bedford Harbor Superfund Site.

#### *EPA's Continuing Role at the Site As Recognized in the AOC*

##### *A. Post-Removal Site Control*

Through the AOC, EPA continues to have a role at the Aerovox Site both during and after the 21E cleanup to ensure the NTCRA work remains protective and compliant with the TSCA Determination, as well as to ensure its understanding of the 21E cleanup as it informs EPA's actions in planning and implementing the New Bedford Harbor Site cleanup. Paragraph 67 of the AOC provides for post-removal site controls including maintenance and monitoring of the NTCRA work during and after the 21E cleanup. The AOC defines post-removal site controls to mean "the measures that are necessary to ensure the effectiveness and integrity of the NTCRA after the completion of the removal action."<sup>1</sup> To effect these particular controls, AVX proposed and, after lengthy discussions and revisions, EPA approved a Maintenance and Monitoring Plan, dated May 2013 ("MM Plan") which sets out the roles and responsibilities for maintenance and monitoring at the Site. For example, during the 21E work, Section 2 requires AVX to

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<sup>1</sup> See Section 1.3 of the MM Plan for a general discussion of the purpose and timing of the post-removal site controls that are the subject of the MM Plan.



conduct annual cap and containment barrier inspections and conduct any necessary maintenance; Section 6 requires that AVX submit documentation of those efforts to EPA. As you know, EPA representatives have attended those annual inspections. Once the 21E work is completed, Sections 3 and 4 set out long-term monitoring and maintenance requirements for groundwater, the Site cap and the containment barrier to ensure the NTCRA work remains protective and compliant with the TSCA Determination, again with reporting requirements to EPA as directed in Section 6. These requirements are independent of any conditions MassDEP may require for long-term monitoring and maintenance of components of the 21E cleanup.<sup>2</sup> Because the post-removal site controls are required to ensure the integrity and effectiveness of the NTCRA work and to ensure that it remains in compliance with the TSCA Determination, EPA maintains a continuing role in cleanup activities at the Aerovox Site pursuant to the AOC.

In addition, as the parties recognized in footnote 5 of the MM Plan, EPA's role as a regulatory agency does not end because it issued a TSCA Determination for the NTCRA work: "Should PCB impacts outside the boundary of the Site be identified during the 21E/MCP program (for example PCBs in soil or pavement on adjacent property to the south), the 21E/MCP response actions will address such circumstances *in compliance with TSCA* and such areas may be added to the long-term OMM Plan at that time." (*emphasis added*).

#### *B. TSCA Compliance*

As you correctly point out in your September 2 letter, because the TSCA program cannot be delegated by EPA to the State, a significant amount of time during our 2010 settlement negotiations was focused on providing AVX, to the extent possible, assurance that both the NTCRA work and the anticipated 21E work at the Site, if performed in accordance with conditions set out in the TSCA Determination, would satisfy TSCA's requirement under 40 CFR 761.61(c) that PCB-contamination not pose an unreasonable risk of injury to health or the environment. The intent of EPA's recognition of the anticipated 21E work was never to eliminate the need for TSCA compliance. Instead, EPA was able to set out in its TSCA determination a minimum set of standards or conditions at the Site that if complied with, would satisfy TSCA regulations. Specifically, the TSCA determination anticipated that the 21E work would include some type of engineered

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<sup>2</sup> Section 2 of the MM Plan states, "TSCA Determination Condition 5 requires that response actions under the 21E/MCP program involving penetrations of the capped areas be conducted in a manner that is protective of health, safety, public welfare and the environment and in accordance with the health and safety requirements of the MCP. It further provides that upon completion of the 21E/MCP work, any disturbed areas must be restored to meet at a minimum the capping requirements in the Action Memorandum. The Site cap must continue to function as a barrier to direct contact with underlying contaminated site soils and to minimize infiltration during the 21E/MCP period." Section 3 of the MM Plan states, "The TSCA Determination includes certain conditions for long-term monitoring and maintenance that must be met to ensure, in accordance with Section 761.61(c) of TSCA, that the NTCRA does not pose an unreasonable risk of injury to health or the environment. The implementation and maintenance of these conditions are independent of any conditions required for long-term monitoring and maintenance by MassDEP's approval of the RAO or ROS submittal."



barrier, a containment wall, groundwater monitoring, and land and groundwater use controls, based on the then-understanding of Site conditions. As long as regulated PCB contamination is present at any Site, however, TSCA has a role regardless of whether or not there is a settlement agreement or a TSCA Determination in place. Should site conditions change, after the TSCA program has provided approval of certain work or after issuance of a TSCA Determination under § 761.61(c), the TSCA program re-evaluates regulatory compliance and prior risk-based determinations in light of the changed conditions.

Through the 21E investigations undertaken by AVX, and sediment sampling conducted in 2012 and 2015 by EPA in the Acushnet River along the Aerovox Site shoreline, information about the presence of DNAPL and off-site migration of PCB contamination has been discovered that now requires the TSCA program to re-evaluate the TSCA Determination. The risk-based determination issued under TSCA may no longer be protective based on the newly discovered conditions at the Site, including the presence of DNAPL both on- and off-site and the off-site migration of PCB contamination. EPA's TSCA program will need to re-evaluate conditions and proposed actions to address PCB contamination both on- and off-site to determine whether or not TSCA regulatory requirements have been met.<sup>3</sup>

*c. Section XXI of the AOC*

EPA's continued role at the Site is consistent with its CERCLA authority as set out in the AOC. Section XXI of the AOC (Covenant Not To Sue By EPA) provides AVX with a covenant not to sue or take administrative action by EPA pursuant to Sections 106 and 107(a) of CERCLA based on certain conditions. The discovery of DNAPL on the Site and the presence and migration of contamination off-site were unknown to EPA as of the effective date of the AOC and as set forth in the Action Memorandum and the administrative record supporting the Action Memorandum. In Section XXII (Reservation of Rights By EPA), EPA reserved its reopener rights based on unknown conditions or unknown information as described in that Section. While EPA has not exercised its rights under the reopener, given that the Aerovox Site is adjacent to the New Bedford Harbor Site, that the Aerovox Site is the primary source of contamination to the New Bedford Harbor Site, and that there is a significant risk of impacts from the Aerovox Site to the Harbor Site, EPA's Superfund program will remain engaged in reviewing the Aerovox Site 21E cleanup through communications with MassDEP, by attending meetings with both MassDEP and AVX, and through its TSCA program.

Next Steps

Because the 21E work is now transitioning from studying the nature and extent of contamination to actual remedial tasks, and given the challenging condition of addressing DNAPL, the TSCA program, in order to fulfill its function, requires a more formal role in

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<sup>3</sup> The term "off-site" as used in this letter refers to any location not within the definition of "Site" as that term is defined in the AOC.



overseeing the 21E work as it relates to addressing PCB contamination. Therefore, in order to perform its regulatory duties to ensure the ongoing 21E work is conducted in compliance with TSCA, review and approval of AVX's proposed work is necessary.

At this time, EPA's TSCA program is not requiring that AVX perform additional work to come into compliance. The TSCA program will also consider the filing of the August 2016 Phase III Remedial Action Plan, prepared by Brown and Caldwell, as a submission to EPA for review and approval for compliance with TSCA. EPA will provide comments on the submission by November 2, 2016. AVX should contact Kim Tisa directly to make arrangements for future submission of appropriate documents. Kim will also contact MassDEP to discuss a method for concurrent review and approval of documents, as is customary at 21E sites, for this coordinated review process.

EPA recognizes the complexity of the cleanup of the Aerovox Site and is also appreciative of the cooperative relationship AVX has exhibited in coordinating with EPA as the cleanup progresses. It is not EPA's intention to slow the progress of the 21E cleanup; instead, EPA encourages AVX to continue its efforts to address Aerovox Site contamination. As EPA moves forward with its dredging of the New Bedford Harbor Site, EPA believes it would be beneficial for the parties to meet to begin closer technical coordination of the two Site cleanups.

Should you have any questions about this letter, please contact me at (617) 918-1888.

Very truly yours,

Cynthia Catri  
Senior Enforcement Counsel

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